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Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES ET AL., PETITIONERS
V.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES ET AL., PETITIONERS
V.
HAWAII, ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURAIE

The MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. MJC has represented clients facing myriad human rights and civil rights injustices, including issues of discrimination, the unlawful detention of foreign nationals, and the rights of marginalized groups in the American justice system. MJC has an interest in the rule of law and the independence of the judiciary in determining whether government officials have acted with discriminatory animus against an unpopular minority group.

MJC submits this brief to document the President's extensive record of hatred against people of the Muslim faith, his open desire to curtail their rights, and his specific, sustained promise to inhibit their entry to the U.S. MJC's prior briefing was relied upon by the U.S. District Court for the District of Hawaii in enjoining Executive Order 13780, *see Hawai'i v. Trump*, Civ. No. 17-00050, __ F. Supp. 3d __, 2017 WL 1011673, at *14 n.14 (D. Haw. Mar. 15, 2017), and by parties in the proceedings below.[1]

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[1] No person other than MJC and its counsel authored any part of this brief or made a financial contribution to the brief. Petitioners have filed a blanket letter of consent. Consent from Respondents has been lodged with the Clerk's office.

SUMMARY OF ARGUMENT

This President of the United States selected an unpopular minority faith that makes up 1% of the nation's population, ran a campaign that vilified and spread propaganda about that minority faith, and then—immediately upon taking office—sought to deliver on one of his most repeated promises: To prevent people of that faith from entering the country. The MacArthur Justice Center submits this brief to document the President's extensive record of hatred against Muslims, his open desire to curtail their rights in various ways, and his specific, sustained pledge to inhibit their entry.

In its opening brief, the government claims a "stark disconnect" between Executive Order 13780 and the President's pledge to restrict the entry of Muslims from the country. Pet. 77. It writes off the latter as mere "campaign-trail comments" or "informal remarks." Pet. Br. 71, 73. The government's characterization is divorced from fact. The record shows that the President's promise to restrict the entry of Muslims was made with remarkable specificity. Not only did he openly and repeatedly express his discriminatory intent, but he telegraphed that he would achieve it under the guise of a neutral order—by speaking in terms of "territories" and "extreme vetting" instead of "Muslims" (just as he would later do). He also explained how he would get away with it—by asserting the President's broad immigration authority under 8 U.S.C. § 1182(f), the provision invoked in his Order and by the government before

this Court. Pet. Br. 39-40. Indeed, Mr. Trump even invoked the internment of Japanese Americans during World War II as proof that he would succeed in singling out Muslims. Executive Order 13780 is the assault on Muslims that the President promised he would deliver.

Fact also belies the government's suggestion that the President's animus toward Muslims requires a "selectively negative interpretation" or a "wide-ranging search for pretext." Pet. Br. at 14, 67. As documented herein, the President engaged in a sustained and targeted attack on Muslim people, labeling them a "problem" and affirmatively disseminating anti-Muslim propaganda. He openly and repeatedly expressed his desire to curtail the rights of persons who practice Islam, including by shutting down mosques, surveilling and profiling Muslims, and creating a Muslim registry.

Finally, while the government asks the Court to imagine that the President has retracted or abandoned his discriminatory objective since being elected, Pet. Br. 73, the facts show that he has reaffirmed it. Indeed, the President has repeatedly and specifically chided the Department of Justice for making his Executive Order "politically correct"—directly implying that he views the territories named to be a proxy for Muslims. Moreover, despite the Acting Solicitor General's repeated representations that Executive Order 13780 has no relation to the President's long-promised "Travel Ban," the President has repeatedly characterized it as just that. The government's suggestion that the oath of

office "mark[ed] a profound transition" is incredible in light of the actual facts: Within days of taking office, the President signed an executive order without consulting any of his national security experts. Upon reading the order's abstruse title, he added: "We all know what that means"—an obvious reference to his longstanding pledge to restrict the travel of Muslims. His revised, "politically correct" order—by his Administration's own admission— was designed to achieve "the same basic policy outcome."

If this Court failed to intervene on this record, the judicial abdication would be matched only by cases like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Korematsu v. United States*, 323 U.S. 214 (1944). Indeed—setting aside the President's express invocation of Japanese American internment—the government's call for this Court to step aside because "the President made a national-security judgment," Pet. Br. 66-78, is chillingly reminiscent of the closing remarks defending the government's detention of Japanese Americans in *Korematsu* itself:

> To cast this case into outlines of [religious] prejudice, without reference to the real military dangers which were presented, merely confuses the issue. [Muslims were] not excluded from the [United States] because of hostility to [them] or [their religion]. [They were] excluded because we are at war with [radical Islamic terrorism], because the [President] feared an invasion of our [country] and felt constrained to take proper security measures, because [he] decided that the military urgency of the situation demanded that

> [certain persons of Muslim religion] be segregated from the [United States] temporarily, and, finally, because [the President] . . . determined that [he] should have the power to do just this. There was evidence of disloyalty on the part of some [Muslims], the [President] considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Id. at 233 (with modification in brackets).

The MacArthur Justice Center urges the Court not to repeat that depraved moment in U.S. history.

ARGUMENT

I. The President's Expressions Of Hatred, Dissemination Of Propaganda, And Pledges To Use His Official Power Against Muslims.

The President's Executive Order followed repeated and unabashed admissions of an intent to discriminate against people who choose to practice Islam. This Section documents the President's hateful statements against Muslim people, his affirmative dissemination of propaganda vilifying them, his expressed desire to oppress them, and his specific and sustained pledge to restrict their entry into the country.

A. The President's Description Of Muslim People As A "Problem" And His Spreading Of Vilifying Propaganda.

1. Labeling Muslims A "Problem."

President Trump has long advocated that a "Muslim problem" exists in the U.S., that Islam is a religion of "tremendous hatred," and that there is no meaningful distinction between being Muslim and being a terrorist. As early as April 2011, he recounted:

> Bill O'Reilly asked me is there a Muslim problem? And I said absolutely, yes. In fact I went a step further. I said I didn't see Swedish people knocking down the World Trade Center. . . . I mean I could have said, "Oh absolutely not Bill, there's no Muslim problem, everything is wonderful, just forget about the World Trade Center." But you have to speak the truth. . . . The Koran is very interesting. . . . there's something there that teaches some very negative vibe. . . . there's tremendous hatred out there that I've never seen anything like it.[2]

The President has repeatedly echoed these views. On September 18, 2015, for instance, Mr. Trump had the following exchange with an audience member at an event:

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[2] David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a 'Very Negative Vibe,'* CBN News (Apr. 12, 2011), http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches.

Questioner:	"We have a problem in this country. It's called Muslims."
Mr. Trump:	"Right."
Questioner:	"You know our current president is one. You know he's not even an American."
Mr. Trump:	"We need this question."[3]

The President has adhered to his view that people of the Muslim faith are a "problem" and vilified them on numerous other occasions:

- On December 10, 2015, Mr. Trump tweeted three separate statements referring to a "massive Muslim problem," praising an author for acknowledging "Muslim problems," and associating Muslims with terrorism.[4]
- On February 4, 2016, Mr. Trump was asked to clarify: "Is it really a Muslim problem, or is it a radical Islamist problem?" He declined to

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[3] Jonathan Merritt, *Trump's Proposals Could Backfire on Christians*, The Atlantic (Nov. 24, 2015), https://www.theatlantic.com/politics/archive/2015/11/donald-trump-muslims-christians/417255/; Theodore Schleifer, *Trump doesn't challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/.

[4] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674934005725331456; Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/674936832010887168; Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675123192864899072.

accept that distinction, saying, "Maybe it's a Muslim problem, maybe it's not."[5]

- On March 9, 2016, Mr. Trump stated, "I think Islam hates us" and that Muslims have "tremendous hatred" and "unbelievable hatred." He expressly rejected that a distinction could be drawn between radical Islam and Islam itself, claiming "[i]t's very hard to define."[6]
- The following day, on March 10, 2016, Mr. Trump was asked whether his statement that "Islam hates us" referred to all 1.6 billion Muslims in the world. He responded: "I mean a lot of them. I mean a lot of them." When given another opportunity to clarify, he stated: "There's something going on that maybe you don't know about, maybe a lot of other people don't know about, but there's tremendous hatred. And I will stick with exactly what I said [the previous day]."[7]
- On June 13, 2016, Mr. Trump equated Islam with the Islamic State terrorist group and

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[5] CNN Interview of Donald Trump, YouTube (Feb. 4, 2016), https://www.youtube.com/watch?v=uW9UlMqJtro (minutes 18:42 to 18:46).

[6] Theodore Schleifer, *Donald Trump: 'I think Islam hates us'*, CNN (Mar. 10, 2016), http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/.

[7] *Transcript of Republican Debate in Miami*, CNN (Mar. 15, 2016), http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/.

stated that "[r]efugees are trying to take over our children" by telling them "how wonderful Islam is."[8]

2. Spreading Anti-Muslim Propaganda.

The President has gone further, disseminating propaganda that vilifies people of the Muslim faith. On November 21, 2015, for instance, he falsely proclaimed: "I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering."[9]

In the face of the authorities and articles debunking his claim,[10] Mr. Trump continued to spread this lie:

- On November 22, 2015, he stated: "There were people that were cheering on the other side of

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[8] *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (Jun. 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats (minutes 20:05 to 20:30).

[9] Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, Wash. Post (Nov. 22, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/.

[10] *See, e.g.*, Lauren Carroll, *Fact Checking Trump's claim that thousands in New Jersey cheered when World Trade Center tumbled*, Politifact (Nov. 22, 2015), http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch/.

> New Jersey, where you have large Arab populations. They were cheering as the World Trade Center came down. . . there were people cheering as that building came down—as those buildings came down. And that tells you something."[11]

- On November 23, 2015, he again stated: "I saw people getting together and, in fairly large numbers, celebrating as the World Trade Center was coming down, killing thousands of people–thousands and thousands of people... People are still dying over what happened with the World Trade Center. And they're dying a terrible death. And I saw people."[12]
- On November 25, 2015, Mr. Trump tweeted: "Credible Source on 9-11 Muslim Celebrations: FBI" and linked to an article stating that a retired FBI agent referred to Mr. Trump's claims as "plausible."[13]

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[11] *See* Kessler, *supra* note 9.

[12] AP Archive, Trump Defends 9/11 Celebrations with Article (Nov. 24, 2015), http://www.aparchive.com/metadata/US-OH-Trump-CR-/cadcfee1334d2a1fea065ba383ef6f8e; Jenna Johnson, *Donald Trump on waterboarding: "If it doesn't work, they deserve it anyway,'* Wash. Post (Nov. 23, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/.

[13] Donald J. Trump, Twitter (Nov. 25, 2015), https://twitter.com/realDonaldTrump/status/669682774673137665; *see also* Bill Riales, *Credible Source on 9-11 Muslim Celebrations: FBI*, WKRG (Nov 25, 2015), http://wkrg.com/2015/11/25/credible-source-on-9-11-muslim-celebrations-fbi/.

- On December 2, 2015, Mr. Trump shared another individual's tweet claiming to have seen "militant Muslims burning our flag and burning George Bush photos and figures, right after 9/11!"[14]
- On December 7, 2015, Mr. Trump repeated his November 25, 2015 tweet, linking to the article calling his claim "plausible."[15]

The President also repeatedly praised a false story involving the mass murder of Muslims using pig blood. On February 19, 2016—treating "terrorist" as a synonym for being Muslim—he approvingly recounted the following story:

> Early in the century, last century . . . they had a terror problem. And you know there's a whole thing with swine and animals and pigs and you know the story, they don't like that. And they were having a tremendous problem with terrorism. . . General Pershing was a rough guy. . . he took the 50 terrorists, and he took 50 men and he dipped 50 bullets in pigs' blood . . . And he had his men load his rifles, and he lined up the 50 people, and they shot 49 of those

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[14] Donald J. Trump, Twitter (Dec 2, 2015), https://twitter.com/realDonaldTrump/status/672182509111767041.

[15] Donald J. Trump, Twitter (Dec 7, 2015), https://twitter.com/realDonaldTrump/status/673905762087936000; *see also* Riales, *supra* note 13.

> people. . . And for 25 years, there wasn't a problem.[16]

President Trump repeated this anti-Muslim propaganda, adding new flourish. On March 11, 2016, for instance, again equating being a terrorist to being a Muslim, he recounted:

> So General Pershing, . . . they catch 50 terrorists in the Philippines . . . And as you know, swine, pig, . . . a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets. . . . They put the bullets into the rifles. And they shot 49 men. . . . I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country

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[16] C-Span, Donald Trump Campaign Rally in Charleston, South Carolina (Feb. 19, 2016), https://www.c-span.org/video/?404947-1/donald-trump-campaign-rally-charleston-south-carolina (minutes 34:09 to 35:31); Louis Jacobson, *Donald Trump cites dubious legend about Gen. Pershing, pig's blood and Muslims,* Politifact (Feb. 23, 2016), http://www.politifact.com/truth-o-meter/statements/2016/feb/23/donald-trump/donald-trump-cites-dubious-legend-about-gen-pershi/; Jenna Johnson and Jose A. DelReal, *Trump tells story about killing terrorists with bullets dipped in pigs' blood, though there's no proof of it,* Wash. Post (Feb. 20, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/02/20/trumps-story-about-killing-terrorists-with-bullets-dipped-in-pigs-blood-is-likely-not-true/; *see also* David Mikkelson, *Pershing the Thought,* Snopes (Apr. 28, 2016), http://www.snopes.com/rumors/pershing.asp, debunking Mr. Trump's story about General Pershing.

> any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one. . . For 28 years, there was no terrorism. . . . We have to do what we have to do. We have to clean it out."[17]

As discussed in Section I.D, the President has continued to repeat this propaganda after taking office and as recent as August 17, 2017.[18]

B. The President's Express Desire To Close Down And Surveille Mosques, Profile Muslims, And Create A Muslim Registry.

1. Closing And Surveilling Mosques.

The President has, on numerous occasions, called for closing and surveilling mosques in America. On

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[17] Mr. Trump also equated being Syrian and being a terrorist, breaking in the middle of his story to say, "And by the way, we have to get to the bottom of it, we cannot allow people to come into the country who want to destroy us, we cannot do it. We can't allow the Syrians. We can't allow the migration of the Syrians into the country." *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YouTube (Mar. 12, 2016), https://www.youtube.com/watch?v=-9KOAHf4GCw (minutes 42:45 to 46:45); Mark Z. Barabak, *All in a day's Trump rally: sneering, sarcasm, protests*, Los Angeles Times (Mar. 12, 2016), http://www.latimes.com/nation/politics/la-na-trump-rallies-20160312-story.html; *see also* Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets*, The Hill (Mar. 12, 2016), http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs.

[18] *See* Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088 (encouraging people to "[s]tudy what General Pershing of the United States did to terrorists when caught.").

November 16, 2015, for example, he expressed his preference for shutting down mosques, saying: "[I]t's something that you're going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is coming from these areas."[19]

Two days later, when asked whether he would actually shut down mosques, Mr. Trump responded that there was "absolutely no choice" but to do so: "A lot of people understand it. We're going to have no choice. There's absolutely no choice."[20]

The President has called for shutting down mosques or the suspicionless surveillance of mosques on numerous other occasions:

- On October 21, 2015, Mr. Trump stated that he was "going to have to certainly look at" closing mosques in the United States.[21]

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[19] Jenna Johnson, *Donald Trump would 'strongly consider' closing some mosques in the United States*, Wash. Post (Nov. 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/.

[20] Nick Gass, *Trump: 'Absolutely no choice' but to close mosques*, Politico (Nov. 18, 2015), http://www.politico.com/story/2015/11/trump-close-mosques-216008; *Trump says US will 'have no choice' but to shut some mosques down*, Fox News (Nov. 18, 2015), http://www.foxnews.com/politics/2015/11/17/trump-says-us-will-have-no-choice-but-to-shut-mosques-down.html.

[21] Sarah Pulliam Bailey, *Donald Trump says he would consider closing down some mosques in the U.S.*, Wash. Post (Oct. 21, 2015), https://www.washingtonpost.com/news/acts-of-

- On November 16, 2015, Mr. Trump said: "You're going to have to watch and study the mosques, because a lot of talk is going on at the mosques."[22]
- On November 19, 2015, Mr. Trump was asked whether his push for increased surveillance of American Muslims could include warrantless searches. He explained that he would consider a series of drastic measures against Muslims: "We're going to have to do things that we never did before. . . . And certain things will be done that we never thought would happen in this country in terms of information and learning about the enemy. And so we're going to have to do certain things that were frankly unthinkable a year ago."[23]
- At a November 21, 2015 rally, Mr. Trump stated: "[J]ust to say it clear—I want surveillance of these people. I want

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faith/wp/2015/10/21/donald-trump-says-he-would-consider-closing-down-some-mosques-in-the-u-s/.

[22] Louis Jacobson, *Donald Trump says he never called for profiling Muslims*, Politifact (Sept. 21, 2016), http://www.politifact.com/truth-o-meter/statements/2016/sep/21/donald-trump/donald-trump-says-he-never-called-profiling-muslim/.

[23] Hunter Walker, *Donald Trump has big plans for 'radical Islamic' terrorists, 2016 and 'that communist' Bernie Sanders*, Yahoo News (Nov. 19, 2015), https://www.yahoo.com/news/donald-trump-has-big-plans-1303117537878070.html.

surveillance if we have to, and I don't care. . . . I want surveillance of certain mosques."[24]

- On December 7, 2015, Mr. Trump called for the surveillance of mosques, again equating the Muslim religion with hatred and terror: "Yes, we have to look at mosques . . . . We have no choice. We have to see what's out there, because something is happening in there. Man, there's anger. There's anger. And we have to know about it."[25]
- On June 13, 2016, Mr. Trump stated: "We have to be very strong in terms of looking at the mosques, you know, which a lot of people say, 'Oh, we don't want to do that. We don't want to do that.' We're beyond that."[26]
- On June 15, 2016, Mr. Trump stated: "We have to go and we have to maybe check, respectfully, the mosques."[27]

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[24] Lauren Carroll, *In Context: Donald Trump's comments on a database of American Muslims,* Politifact (Nov. 24, 2015), http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/;.

[25] Jessica Taylor, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR (Dec. 7, 2015), http://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s; Transcript, *Trump Calls for Ban on Muslims Entering the U.S.*, CNN (Dec 8, 2015), http://www.cnn.com/TRANSCRIPTS/1512/08/es.02.html.

[26] *See* Jacobson, *supra* note 22.

[27] Jeremy Diamond, *Trump doubles down on calls for mosque surveillance,* CNN (Jun. 15, 2016),

- On June 19, 2016, when asked what it means to "respectfully check a mosque," Mr. Trump clarified that he meant the suspicionless surveillance and shutdown of mosques: "Well, you do as they used to do in New York, prior to this mayor dismantling. By the way, if you go to France right now, . . . they are closing down mosques. People don't want to talk about it. People aren't talking about it. But look at what they're doing in France. They are actually closing down mosques."[28]

2. Registering American Muslims.

Mr. Trump has repeatedly advocated for registering all Americans who choose to practice the Muslim faith.

On November 19, 2015, Mr. Trump was asked whether he would require Muslims to register or carry a special form of identification that noted their religion, and he responded: "We're going to have to look at a lot of things very closely. We're going to have to look at the mosques. We're going to have to look very, very carefully."[29] The following day, when asked pointedly whether he was in favor of

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http://www.cnn.com/2016/06/15/politics/donald-trump-muslims-mosque-surveillance/.

[28] *Face the Nation transcripts June 19, 2016: Trump, Lunch, LaPierre, Feinstein*, CBS News (Jun. 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/; *see also* Jacobson, *supra* note 22.

[29] *See* Walker, *supra* note 23.

implementing a database tracking Muslims, he responded, "Oh I would certainly implement that. Absolutely."[30] When asked whether Muslims would be legally obligated to sign into the database, Mr. Trump responded, "They have to be—they have to be."[31]

Mr. Trump was asked how registering Muslims would be different from the Nazis' registration of Jewish people. He responded four times: "You tell me."[32]

The President has echoed his call for a registry of American Muslims on several occasions:

- On November 21, 2015, Mr. Trump reaffirmed his desire to have a database of all Muslims: "So the database—I said yeah, that's alright fine . . . but database is okay, and watch list is okay, and surveillance is okay. If you don't mind, I want to be—I want to surveil."[33]
- The following day, Mr. Trump was asked: "You did stir up a controversy with those comments over the database. Let's try to clear

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[30] Vaughn Hillyard, *Donald Trump's Plan for a Muslim Database Draws Comparison to Nazi Germany,* NBC News (Nov. 20, 2015), http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716.

[31] *Id.*

[32] *Id.*

[33] ABC 33/40, Donald Trump in Birmingham: Full speech at the BJCC (Nov. 21, 2015), https://www.youtube.com/watch?v=IgvPoFo1zPY (minutes 43:11 to 43:32).

that up. Are you unequivocally now ruling out a database on all Muslims?" He responded, "No not at all."[34]

- The day following that, Mr. Trump stated: "We have to really be vigilant with respect to the Muslim population . . . we have to surveil; we have to create lists; we have the refugees coming in and we have to create lists."[35]

3. Profiling Muslims.

On June 19, 2016, Mr. Trump stated that it was "common sense" to profile Muslims.[36] He later went further, stating on September 19, 2016, that there is "no choice" but to profile Muslim people.[37]

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[34] *See* Carroll, *supra* note 22.

[35] *Donald Trump in Ohio: U.S. has become 'soft, weak,'* Dayton Daily News (Nov. 23, 2015), http://www.daytondailynews.com/news/national-govt--politics/donald-trump-ohio-has-become-soft-weak/5ZOBQutE4XSjTxV2NjvFnJ/.

[36] *Face the Nation transcripts June 19, 2016: Trump, Lynch, LaPierre, Feinstein*, CBS News (June 19, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-19-2016-trump-lynch-lapierre-feinstein/.

[37] Aaron Blake, *Donald Trump doesn't call his position racial profiling. It is.*, Wash. Post (Sept. 20, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/09/20/donald-trump-doesnt-call-his-position-racial-profiling-it-is/.

C. The President's Specific Pledge To Restrict The Entry Of Muslims Under The Guise Of A Neutral Order.

Mr. Trump repeatedly promised that he would prevent Muslims from entering the U.S. and that he would achieve this result by speaking in terms of "territories" and "extreme vetting" instead of using the word "Muslim." He also previewed that, upon doing so, he would invoke the President's broad immigration powers—just as the Government does now—and justified that position by reference to the internment of Japanese Americans during World War II.

On December 7, 2015, Mr. Trump announced on his website: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[38] The same day that Mr. Trump issued this announcement, he tweeted it with the title "Statement on Preventing Muslim Immigration."[39] Further equating Muslims with hatred and terror, he tweeted, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country.

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[38] Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017).

[39] Donald J. Trump, Twitter (Dec. 7, 2015), https://twitter.com/realDonaldTrump/status/673993417429524480.

We must be vigilant!"[40] At a rally the same day, Mr. Trump called for "a total and complete shutdown of Muslims," and added: "We have no choice. We have no choice. We have no choice."[41] He also appeared on national television to advocate his ban on Muslims.[42]

On December 8, 2015, the day following the announcement of his intent to ban Muslims, Mr. Trump was asked whether such a "broad approach against all Muslims" would be counterproductive, in contrast to targeting people the Government had reason to investigate. Mr. Trump confirmed that he would not distinguish between Muslims and people suspected of wrongdoing, citing President Franklin D. Roosevelt's World War II Executive Proclamations authorizing the detention and internment of Japanese, German, and Italian aliens: "[L]ook at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it."[43]

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[40] Jenna Johnson, *Trump calls for 'total and complete shutdown of Muslims entering the United States,'* Wash. Post (Dec. 7, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/.

[41] *Id.*

[42] *Id.*

[43] *Donald Trump On Muslim Travel Ban, Obama And 2016,* YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 00:46 to 01:03); Michael Barbaro and Alan Rappeport, In Testy Exchange, Donald Trump Interrupts

When asked how border officials might implement his plan, Mr. Trump explained: "They would say, 'are you Muslim?'" The commentator further questioned: "And if they said yes, they would not be allowed in the country?" Mr. Trump responded, "That's correct."[44]

That same day, when asked whether he was given "any pause at all" by being compared to Hitler, Mr. Trump again justified banning Muslims based on President Roosevelt's internment of Japanese Americans, stating: "No because what I'm doing is no different than what F.D.R. did. F.D.R.'s solution for Germans, Italians, Japanese, many years ago."[45] Asked if he was in favor of internment camps, Mr. Trump repeated his reliance upon President Roosevelt's actions during World War II: "He did the same thing."[46]

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and 'Morning Joe' Cuts to Commercial, New York Times (Dec. 8, 2015), https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donald-trump-interrupts-and-morning-joe-cuts-to-commercial/.

[44] *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), https://www.youtube.com/watch?v=5I3E3-U-1jc (minutes 14:58 to 15:14); *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), http://www.msnbc.com/transcripts/hardball/2015-12-08.

[45] Miriam Hernandez, *Trump Cites History to Defend Muslim Immigration Ban*, ABC 7 (Dec. 9, 2015), http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396/.

[46] *Id.*

Two days later, on December 10, 2015, Mr. Trump defended his position by publishing a link to an article stating that Islam is a "very evil and wicked religion," a "false religion," advocating that Muslims should be banned, and making further analogy to the treatment of Japanese during World War II.[47]

On March 9, 2016, Mr. Trump stated denied that a distinction could be made between "radical Islam" and "Islam itself," and stated "we can't allow people coming into this country who have this hatred of the United States."[48] Echoing the justification used by the Government to detain Japanese Americans in *Korematsu*—he stated that it was necessary to include all Muslims because "you don't know who is who."[49] *See Korematsu*, 323 U.S. at 218-19 ("temporary exclusion [of all Japanese Americans] was rested by the military" on the rationale that "it was impossible to bring about an immediate segregation of the disloyal from the loyal").

Moreover, on June 13, 2016, Mr. Trump previewed that he would attempt to defend his

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[47] Donald J. Trump, Twitter (Dec. 10, 2015), https://twitter.com/realDonaldTrump/status/675034063447662592; *see also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, Wash. Post (Dec. 10, 2015), https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/.

[48] Transcript, Anderson Cooper 360 Degrees (Mar. 9, 2016), http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html.

[49] *Id.*; *see also* Schleifer, *supra* note 6.

religious ban based on the President's immigration authority. Indeed, just as he did in his Order and the government does before this Court, Mr. Trump invoked the language of 8 U.S.C. § 1182(f), stating that "laws of the United States give the president powers to suspend entry into the country of any class of persons . . . as he or she deems appropriate."[50]

Two days later, on June 15, 2016, Mr. Trump explained that he would not back down from pursuing his "temporary ban on Muslim integration" even if he faced opposition by the Senate, again equating being Muslims with being a radical terrorist. He stated, "You are going to have to watch and are going to have to see. I have done a lot of things that nobody thought I could do."[51]

The government suggests that the President's statement that he would achieve his campaign promise by acting based on "territory" indicates that he abandoned his intent to discriminate against Muslims. Pet. Br. 73-74. That argument is refuted by the President's actual statements, in which he expressly stated that he viewed "territory" as a proxy for the word "Muslim." In particular, on July 21, 2016, Mr. Trump stated, "[W]e must immediately suspend immigration from any nation that has been

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[50] *Donald Trump Remarks in Manchester, New Hampshire*, C-SPAN (June 13, 2016), https://www.c-span.org/video/?410976-1/donald-trump-delivers-remarks-national-security-threats (minutes 5:30 to 6:40).

[51] *Face the Nation transcripts June 5, 2016: Trump*, CBS News (June 5, 2016), http://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/.

compromised by terrorism until such time it's proven that vetting mechanisms have been put in place."[52] Three days later, asked whether this language indicated an intent to "pull back from" the "Muslim ban," Mr. Trump made clear that it was not:

> I don't think so. . . In fact, you could say it's an expansion, I'm looking now at territory. People were so upset when I used the word "Muslim": "Oh, you can't use the word 'Muslim.'" Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. . . .
>
> Now, we have a religious, you know, everybody wants to be protected. And that's great. . . . I view it differently. . . .
>
> We're making it territorial. We have nations and we'll come out, I'm going to be coming out over the next few weeks with a number of the places.[53]

The President advocated restricting the entry of Muslims to the United States on numerous other occasions:

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[52] Politico, *Full text: Donald Trump 2016 RNC draft speech transcript* (July 21, 2016), http://www.politico.com/story/2016/07/full-transcript-donald-trump-nomination-acceptance-speech-at-rnc-225974.

[53] Transcript, Meet the Press, NBC News (July 24, 2016), http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706; Jenna Johnson, *Donald Trump is expanding his Muslim ban, not rolling it back*, Wash. Post (July 24, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/24/donald-trump-is-expanding-his-muslim-ban-not-rolling-it-back/.

- On September 18, 2015, when asked about getting "rid of" Muslims, Mr. Trump responded that he was "going to be looking at that and many other things."[54]
- On October 12, 2015, Mr. Trump tweeted: "Muslims escorted into U.S. through Mexico. Now arriving to Oklahoma and Kansas! Congress?"[55]
- On January 2, 2016, Mr. Trump tweeted: "Hillary Clinton said that it is O.K. to ban Muslims from Israel by building a WALL, but not O.K. to do so in the U.S. We must be vigilant!"[56]
- On March 22, 2016, Mr. Trump tweeted that Hillary Clinton was "incompetent" because she would "let the Muslims flow in. No way!"[57]
- On March 24, 2016, Mr. Trump tweeted that "[i]t is amazing how often I am right" about "Muslims."[58]

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[54] *See* Schleifer, *supra* note 3.

[55] Donald J. Trump, Twitter (Oct. 12, 2015), https://twitter.com/realDonaldTrump/status/653774823483703297.

[56] Donald J. Trump, Twitter (Jan. 2, 2016), https://twitter.com/realDonaldTrump/status/683277309969694720.

[57] Donald J. Trump, Twitter (Mar. 22, 2016), https://twitter.com/realDonaldTrump/status/712473816614772736.

[58] Donald J. Trump, Twitter (Mar. 24, 2016), https://twitter.com/realDonaldTrump/status/713012045214531584.

D. The President Has Reaffirmed His Discriminatory Purpose On Several Occasions Since Being Elected.

The government does not meaningfully contest that the reprehensible statements above demonstrate hatred for, and a desire to discriminate against, people of the Muslim faith. It, instead, argues that "nearly all" of the statements demonstrating the President's intent to assail Muslims took place before he was elected, Pet. Br. 12, 22, 71, 73, and that the Court should ignore them because Mr. Trump has since taken the oath of office, Pet. 73.

That argument is easily refuted by the factual record alone. First, the government's suggestion that the oath of office "mark[ed] a profound transition" in the President, Pet. Br. 73, is belied by the fact that he issued an Executive Order, within days of taking the oath, without consulting any national security experts, doing what he said he would do before he took the oath—down to the details of naming "territories" and the legal authority invoked.

Second—far from ever retracting his pledge—the President has made numerous statements connecting his Executive Order to his discriminatory campaign promise since being elected. Indeed, even if there were some rule against considering pre-election statements (a rule that seems to confuse the *weight* that should be given statements with the *admissibility* of statements), the President's post-election references to those sentences would require their consideration here.

Over a month after being elected, Mr. Trump was asked whether he would reevaluate his intention to ban entry of Muslim people. Referring to his earlier pledge, he responded: "You know my plans all along, and I've been proven to be right."[59]

Within a week of taking the oath of office, the President signed his initial Executive Order. Upon reading its abstruse title, "Protecting the Nation from Foreign Terrorist Entry into the United States," he added, "We all know what that means"—an obvious reference to his well-known pledge to prevent Muslims from entering the country.[60] The same day, President Trump explained on national television that the exceptions he had set forth in his Order were intended to prioritize Christians over Muslims. He stated that he sees Christians as a "priority" and—expressly drawing a comparison between Christian refugees and Muslim refugees—

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[59] Video, *Trump: 'You've known my plans' on proposed Muslim ban*, Wash. Post (Dec. 21, 2016), https://www.washingtonpost.com/video/politics/trump-youve-known-my-plans-on-proposed-muslim-ban/2016/12/21/8a7bba66-c7ba-11e6-acda-59924caa2450_video.html; Abby Phillip and Abigail Hauslohner, *Trump on the future of proposed Muslim ban, registry: 'You know my plans,'* Wash. Post (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/.

[60] *Trump Signs Executive Orders at Pentagon*, ABC News (Jan. 27, 2017), http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173.

he explained that he was "going to help" Christians.[61]

On February 4, 2017, President Trump referred to his initial Executive Order the same way he had throughout his campaign—as a "ban"—stating that "certain Middle-Eastern countries agree with the ban."[62] After the government received stays in judicial proceedings across the country while they revised the Executive Order, the President's senior advisor stated that the new Order would be designed to achieve "the same basic policy outcome" as the first Order and to address only "very technical issues."[63]

On March 15, 2017, the day that President Trump's second Order was first enjoined, President Trump himself stated that the Order was simply "a watered down version of the first order" and expressed that he would prefer to "go all the way"

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[61] David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN News (Jan. 27, 2017), http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees.

[62] Politico, *Trump warns of 'death & destruction' if U.S. not allowed to limit immigration* (Feb. 4, 2017), http://www.politico.com/story/2017/02/trump-travel-ban-judge-james-robart-234643; Donald J. Trump, Twitter (Feb. 4, 2017), https://twitter.com/realDonaldTrump/status/827865957750161408.

[63] Fox News, Transcript, *Miller: New order will be responsive to the judicial ruling* (Feb. 21, 2017), http://www.foxnews.com/transcript/2017/02/21/miller-new-order-will-be-responsive-to-judicial-ruling-rep-ron-desantis/.

and do "what [he] wanted to do in the first place."[64] The next day, President Trump reiterated his oft-expressed view during the campaign that "[t]he assimilation [of Muslims in the U.S.] has been very, very hard. It's been a very, very difficult process."[65]

In these proceedings, the Acting Solicitor General has repeatedly represented that the President's revised Executive Order bears no connection to the "Travel Ban" or "Muslim Ban" for which the President long advocated, attempting to sanitize the Order as a national security judgment based on a need for greater information from the selected nations. *See, e.g.*, Pet. Br. 65, 70.[66] The President's own statements since issuing the revised order,

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[64] Andrew Prokop, *With Trump's new travel order blocked and his health bill flailing, his agenda's in tatters*, Vox (Mar. 16, 2017), http://www.vox.com/policy-and-politics/2017/3/16/14935784/trump-achievements-accomplishments.

[65] Chris Cillizza, *Donald Trump's explanation of his wire-tapping tweets will shock and amaze you*, Wash. Post (Mar. 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/16/donald-trump-explained-twitter-the-universe-and-everything-to-tucker-carlson/.

[66] *See also* Garrett Epps, *Trump's Tweets May Have Sunk His Travel Ban*, Atlantic (June 5, 2017), https://www.theatlantic.com/politics/archive/2017/06/trumps-tweets-may-have-sunk-his-travel-ban/529167/. The President's Press Secretary made similar representations that "it's not a travel ban." Peter W. Stevenson, *Trump says it's a travel 'ban.' His staff insisted it wasn't*, Wash. Post (June 5, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/05/trump-says-its-a-travel-ban-his-staff-insisted-it-wasnt/.

however, make clear that he views it as effectuating his long-promised "Travel Ban." Indeed, he has derided the Department of Justice for making the language in the Executive Order "politically correct," directly implying that his actual intention is to single out Muslims (indeed, his complaint cannot reasonably be attributed any other meaning). In particular, the President has made the following statements:

- On April 26, 2017, the President stated, "the Ninth Circuit rules against the ban . . . ridiculous."[67]
- On June 3, 2017, the President stated, "We need the Travel Ban as an extra level of safety!"[68]
- Two days later, the President stated, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[69]
- The same day, he stated, "The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct

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[67] Donald J. Trump, Twitter (April 26, 2017), https://twitter.com/realDonaldTrump/status/857177434210304001.

[68] Donald J. Trump, Twitter (June 3, 2017), https://twitter.com/realDonaldTrump/status/871143765473406976.

[69] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871674214356484096.

version they submitted to S.C."[70] He further stated, "we need a TRAVEL BAN . . . not some politically correct term that won't help us protect our people."[71]

- One week later, on June 13, 2017, he wrote: "the 9th Circuit did it again - Ruled against the TRAVEL BAN."[72]

Despite being updated daily, the President's website continued to call for a "total and complete shutdown of Muslims entering the United States" when he issued his initial Executive Order, his revised Executive Order, and for long after. Notwithstanding repeated notification,[73] the President continued to call for a total and complete ban on Muslims from the U.S. until May 8, 2017, when the Acting Solicitor General was questioned about it by the Fourth Circuit.[74]

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[70] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871675245043888128.

[71] Donald J. Trump, Twitter (June 5, 2017), https://twitter.com/realDonaldTrump/status/871899511525961728

[72] Donald J. Trump, Twitter (June 13, 2017), https://twitter.com/realDonaldTrump/status/874578159676665857.

[73] *See, e.g.*, Complaint at 7, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Feb. 3, 2017); Amended Complaint at 8, *Hawai'i v. Trump*, 1:17-cv-00050 (D. Haw. Mar. 7, 2017).

[74] Cristian Farias, *Trump's 'Muslim Ban' Pledge Scrubbed From Website Just As Judges Ask About It*, Huffington Post (May 9, 2017), http://www.huffingtonpost.com/entry/trump-muslim-ban-pledge-website_us_591204dfe4b050bdca5ff6c1; Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing*

Most recently, on August 17, 2017, the President again promoted the same anti-Muslim propaganda he repeated while campaigning, that General Pershing was able to eradicate terrorism by murdering captured Muslims with bullets soaked in pigs' blood. *See supra* Part I.A.2. In the immediate wake of a terror attack in Barcelona, he stated, "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"[75]

II. This Court's Failure To Intervene Would Be A Serious Abdication Of The Judicial Role.

The above factual record makes clear that the President's decision to target people from six Muslim-majority countries is intended to effectuate his longstanding and reaffirmed (let alone never disavowed) pledge to restrict the entry of Muslim people. Discrimination against a protected class, such as religion, on the basis of such overt animus is the most obvious and fundamental abuse of government authority that the Establishment and Equal Protection Clauses exist to protect. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating

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Muslim Immigration (Dec. 7, 2015), https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration (Internet Archive record on May 8, 2017).

[75] Donald J. Trump, Twitter (Aug. 17, 2017), https://twitter.com/realDonaldTrump/status/898254409511129088.

factor in the decision, . . . judicial deference is no longer justified.").

The government argues that regardless of whether the President is, in fact, using his power to oppress Muslims, the Court must defer to the Order's facial purpose and the Executive's broad authority over matters relating to immigration. *See* Pet. Br. at 62-66. Not so. It is the Court's duty to protect discrete and insular minority communities, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and to prevent the exercise of Executive power to "harm a politically unpopular group," *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citation omitted). Moreover, this Court has recognized that courts have a duty to enforce the Constitution even when the Executive claims national security concerns. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (the President does not "have the power to switch the Constitution on or off at will" by invoking national security); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("Our precedents . . . make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role."). Indeed, the importance of judicial intervention is at its highest in these circumstances. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, concurring in the judgment, and dissenting in part) ("In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive

Branch of Government, whose particular responsibility is to maintain security.").

The Government's argument is not novel. It is the same line of argument it used advanced 70 years ago to convince this Court to uphold the internment of Japanese Americans in *Korematsu*, now viewed as one of the most shameful decisions in American history. *See* Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (Complete "judicial acquiescence or abdication" in the face of executive discretion "has a name. That name is Korematsu."); Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011) (*Korematsu* "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute").[76]

The MacArthur Justice Center urges the Court not to overlook the extensive record showing that Executive Order 13780 was motivated by animus

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[76] Indeed, at oral argument the Ninth Circuit asked the Acting Solicitor General how the government would distinguish *Korematsu*. Despite having already defended Executive Order 13780 for months, he was unable to provide a single meaningful distinction, stating that he had not reviewed the details of *Korematsu* and offering only that if this case were *Korematsu*, "the United States would not be defending it." Oral Argument at 20:22 to 21:30, No. 17-15589 (9th Cir. Mar. 15, 2017), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000011579. The United States did, of course, defend the reprehensible order in *Korematsu*. Its months-long defense of this Order without meaningfully considering whether it is advocating the same disgraceful end should give this Court great pause.

against people of the Muslim faith, and to avoid repeating the terrible mistake made in generations past.

CONCLUSION

For the foregoing reasons, the MacArthur Justice Center respectfully urges the Court to affirm the courts below.

Respectfully submitted,

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